

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

CONRAD ALBERT BERRY,

Defendant-Appellant.

UNPUBLISHED

November 26, 2013

No. 310454

Shiawassee Circuit Court

LC No. 10-001452-FC

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Conrad Albert Berry pled nolo contendere to one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), in exchange for the dismissal of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and the supplemental charge of habitual offender third offense, MCL 769.11. Although there was a plea agreement between the prosecution and defendant, no sentencing agreement existed. He was sentenced to 86 months to 15 years' imprisonment with credit for 252 days. He now appeals, by delayed leave, the trial court's order denying his motion for resentencing. We affirm his sentence but remand for the ministerial task of re-scoring offense variable 11.

The parties stipulated to use the police report as the factual basis for the CSC II charge for defendant's no contest plea. The judge read the police report into the record. It stated that the thirteen-year-old victim complainant told a forensic interviewer that her step-grandfather, defendant, touched her in her vaginal area when she was ten-years-old. The defendant was staying at her residence in the summer of 2007. One morning during that time period, the defendant and the victim were the only ones in the house. The defendant sat very close to the victim on a couch in the front room of the house and started kissing the victim's neck. He told her that she was very pretty and he told her that if she told anyone, he would kill her entire family. After he kissed her, he touched her "vagina" on the inside and outside of her underwear with his hand.

During sentencing, the prosecutor and defendant's attorney argued about Offense Variable (OV) 7, aggravated physical abuse, MCL 777.37. OV 7 is scored as either 50 points or zero points, depending on whether the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Following the arguments, the trial court scored OV 7 at

50 points. It also scored OV 4 at 10 points, OV 10 at 10 points, and OV 11 at 25 points for a total of 95 offense variable points, which placed defendant in OV level VI with a minimum guideline sentence range of 58 to 114 months.

Defendant then filed a motion to correct invalid sentence, challenging the scoring of OV 7 and OV 11, criminal sexual penetration, MCL 777.41. The trial court heard the motion for resentencing and for OV 7, it looked at defendant's threat to kill the victim's family "from the age and innocence of a ten year old[,]" and found that "this conduct, certainly, qualifies" as "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The court also considered OV 11, by looking to the police report, and found that "when one . . . goes inside [the underwear,] then the purpose of that is to penetrate." Defendant now appeals the scoring of OV 7 and OV 11.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnotes omitted).

Sentencing must be based on accurate information, and may include any facts, "including uncharged offenses, pending charges, and even acquittals," as long as the facts are substantiated by a preponderance of the evidence after being challenged. *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). This Court "shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

A trial court must score 50 points for OV 7 if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). If the defendant did not treat a victim in such a manner, then a trial court must score zero points for OV 7. MCL 777.37(1)(b). "[C]onduct designed to substantially increase the fear and anxiety a victim suffered during the offense[]" can include "circumstances inherently present in the crime[,]" but the court must determine "(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 443-444. Threats of future harm may be sufficient in showing that the conduct rises to the level required to score 50 points for OV 7. *People v McDonald*, 293 Mich App 292, 298-299; 811 NW2d 507 (2011). Conduct is not limited to actual physical abuse and may include emotional or psychological abuse. See *People v Mattoon*, 271 Mich App 275, 277-278; 721 NW2d 269 (2006).

We find that defendant's conduct was designed to cause a substantial amount of additional fear over that generally felt by a victim of this offense. Like the victim in *McDonald*, 293 Mich App at 298-299, who was threatened with future acts of harm, the victim in this case was told that if she told anyone about the incident, defendant would kill her entire family. Additionally, as with the defendant in *Mattoon*, 271 Mich App at 276-278, who held his girlfriend at gunpoint for approximately nine hours in their home, which the Court stated could

be emotional or psychological abuse that caused the victim humiliation, defendant's threat to kill the victim's family in this case could be viewed in the same way. The conduct can be considered emotional and psychological abuse because the victim wrote a letter, which was read on the record at sentencing that expressed her fear that future harm would come to her family. In relevant part, the letter said, "I . . . felt scared because [defendant] said [he] would hurt my family and I hid in the closet." When coupled with the touching of the victim, the conduct was designed to substantially increase the fear and anxiety of the victim to the level of fear that was substantial enough to stop her from telling anyone. Furthermore, because the specific threat of violence was not conduct that is "inherently present" in CSC II, it was "beyond the minimum required to commit the offense." See *Hardy*, 494 Mich at 443-444. Therefore, the trial court did not err when it considered the threats and scored OV 7 at 50 points.

As to defendant's second challenge, a trial court properly scores OV 11 at 25 points if one criminal sexual penetration arising out of the sentencing offense occurred, MCL 777.41(1)(b), and properly scores OV 11 at zero points if no criminal sexual penetration arising out of the sentencing offense occurred, MCL 777.41(1)(c). Although not defined in the statutory sentencing guidelines, "sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, *however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r); *McLaughlin*, 258 Mich App at 673 (emphasis added). Although, the statutory definition of penetration includes "any intrusion . . . however slight . . . into the genital or anal openings of another person's body," evidence that the labia majora was penetrated must be presented before a court can establish that a defendant penetrated the "genital opening." See *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).

We do not find sufficient evidence in the record to support a factual finding by a preponderance of the evidence that a criminal sexual penetration arising out of the sentencing offense (CSC II) occurred. The record indicates that the only evidence that a penetration occurred came from the victim's statement during a forensic interview, that the defendant "touched her vagina on the inside of her underwear with his hand." The victim used the word "vagina," and did not indicate penetration. Moreover, the trial court referenced that touching inside the underwear would prove the purpose of penetration.

Without additional evidence that defendant actually penetrated the victim's genital opening, the trial court's finding that there was a penetration that arose out of the CSC II is not supported. The trial court did not refer to any other evidence that a penetration occurred in its finding of fact that a penetration occurred for scoring OV 11. Therefore, scoring OV 11 at 25 points is clear error. See *Bristol*, 115 Mich App 236.

OV 11 should have been scored at zero, which would have placed the defendant in OV level V rather than level VI. Consequently this changes the guideline minimum sentence range from 58 to 114 months to 50 to 100 months. MCL 777.64. Defendant's actual minimum sentence of 86 months falls within this new range.

Generally if the trial court applied the wrong sentence range, even if the actual minimum sentence falls inside of the correct range, we remand for resentencing. See *People v Johnson*, 474 Mich 96, 98; 712 NW2d 703 (2006). In *Johnson*, we remanded for resentencing because

“the trial court sentenced defendant to a minimum of 100 months under the misapprehension that the statutory sentencing guidelines call for a minimum range of 99 to 320 months when the guidelines actually call for a minimum range of 87 to 290 months . . .” *Id.*

However, in this case, the trial judge stated during the re-sentencing motion:

And I would say this, if I’m in error on the evaluation of the scoring that in no way would this sentence – if, if the guidelines topped out at eighty-six (86) months – no way would this sentence be any less by this Court based on the fact that we have a pedophile in this Defendant and one of the objectives of this sentence was to get this person off the street so that he would not victimize any more ten (10) or eleven (11) year old young children.

Therefore, because the trial judge unequivocally indicated that even if he had erred in scoring the offense variables, he would have handed down the same sentence, we remand only for the ministerial task for rescoreing OV 11 only, and affirm defendant’s sentence.

Affirmed in part and remanded in part for re-scoring of offense variable 11 consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Amy Ronayne Krause